



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dutra/AmClyde Joint Venture

File: B-249364.2

Date: December 30, 1992

Marcus B. Slater, Jr., Esq., Fort & Schlefer, for the protester.
Douglas K. Olson, Esq., Kilcullen, Wilson and Kilcullen, for IMPSA International, an interested party.
Paul M. Fisher, Esq., and Lucie J. McDonald, Esq., Department of the Navy, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's cancellation of solicitation after bid opening on the basis that all otherwise acceptable bids are unreasonable in price is proper where the responsive bids exceed the government estimate by a significant amount and the protester has not shown that the government estimate was unreasonably low.

2. Where invitation for bids (IFB) was canceled and procurement was converted to a negotiated one after rejection of all otherwise acceptable bids for price unreasonableness, agency determination to enter into negotiations with bidders prior to making any responsibility determinations was proper; Federal Acquisition Regulation § 15.103 (which refers to negotiations with each "responsible" bidder which submitted a bid under the canceled IFB) generally applies only to bidders already found nonresponsible under canceled IFB.

DECISION

Dutra/AmClyde Joint Venture protests the Department of the Navy's cancellation of invitation for bids (IFB) No. N62472-90-B-1458, and the subsequent conversion to a negotiated procurement under request for proposals (RFP) No. N62472-90-R-1458. The Navy states that the decision to cancel the IFB was based on its determination that all otherwise acceptable bids were unreasonable as to price. Dutra/AmClyde disputes this finding and argues, primarily, that the determination was unreasonable.

We deny the protest.

The Navy issued the solicitation on April 15, 1992, for a base quantity of two 60-ton portal cranes to be supplied to the naval shipyard at Puget Sound, Washington; four options provided for up to eight additional cranes to be supplied to various other naval shipyards. Section M of the IFB instructed that award would be made based upon the total bid price of all items, including the option items, to the responsive, responsible firm bidding the lowest acceptable price. The government estimate was \$46,072,719. Three firms submitted bids in response to the solicitation by the July 2 extended bid opening; the bids were priced as follows:

Westmont Industries	\$38,210,000
IMPISA International	65,869,000
Dutra/AmClyde Joint Venture	76,364,279

During the evaluation of Westmont's apparent low bid, Dutra/AmClyde filed a protest in our Office asserting that Westmont's bid bond was defective, rendering its bid nonresponsive, and that IMPISA's bid was subject to a Buy American Act price adjustment. Our Office dismissed the protest as premature since no award decision had yet been made, and Dutra/AmClyde subsequently filed two agency-level protests. The first protest alleged that Westmont and IMPISA were not responsible bidders for various reasons; the second protest repeated the allegations made in Dutra/AmClyde's earlier protest to our Office.

The contracting officer reviewed the issues raised by Dutra/AmClyde's protests and resumed his evaluation of Westmont's bid documents. By letter dated August 19, he advised all bidders of his determination that Westmont's bid was non-responsive due to a defective bid bond. In that same letter, the contracting officer stated that he found the remaining bids unreasonable as to price; consequently, the solicitation was canceled pursuant to Federal Acquisition Regulation (FAR) § 14.404-1(c)(6) and converted to a negotiated procurement pursuant to FAR §§ 14.404-1(a) and 15.103.¹ By separate letter, also dated August 19, the agency responded to Dutra/AmClyde's protests by essentially

¹Amendment No. 0005 was issued on September 2, converting the acquisition to a negotiated procurement; proposals were received from each of the original three bidders on September 10. Contract award was initially withheld pending resolution of this protest; however, on October 22 the agency determined that urgent and compelling circumstances existed and proceeded to award and performance, in accordance with 4 C.F.R. § 21.4(a) (1992). Westmont was awarded the contract for the base year.

repeating the information contained in the letter sent to all bidders. The instant protest to our Office followed.

Dutra/AmClyde protests the contracting officer's decision to cancel the solicitation and conduct a negotiated procurement. The protester argues that the Navy's determination that its bid was unreasonable as to price was arbitrary and capricious and not in accordance with law. The protester also argues that the Navy was required to make responsibility determinations prior to negotiating with the three bidders under the negotiated procurement.

Once bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the IFB. FAR § 14.404-1(a)(1). Such a compelling reason to cancel the IFB exists when it is determined that all otherwise acceptable bids received are at unreasonable prices. FAR § 14.404-1(c)(6). If an IFB is canceled due to unreasonable prices, the agency may complete the acquisition through negotiation if properly authorized in the determination to cancel the IFB. FAR § 14.404-1(e)(1).

An agency's determination of price reasonableness involves the exercise of broad discretion on the part of the contracting officer, which our Office will not question unless it is unreasonable. Sylvan Serv. Corp., B-222482, July 22, 1986, 86-2 CPD ¶ 89. The FAR provides that the contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. See FAR §§ 14.407-2, 15.805-2. One of those techniques is a comparison of the prices received with the independent government estimate. FAR § 15.805-2(e); Sylvan Serv. Corp., supra.

Here, the record shows that the agency, in making its price reasonableness determination, relied on a comparison between the bids received and the government estimate. The government estimate was prepared by the cost estimator for the Navy Crane Center, whose duties include the review and preparation of all cost estimates for new crane procurements and change orders to existing contracts. To calculate the government estimate, he used as a base the award price under a similar 1986 contract,² adjusted downward for costs unique to that contract. He then adjusted the resulting base price upward to include costs associated with training, design, destination, and inflation.

²The 1986 contract was for 23 portal cranes at various naval shipyards located on the East Coast; Dutra/Amclyde states that it was the principal subcontractor for this contract.

When bids were opened and it was apparent that, aside from Westmont's bid, they far exceeded the government estimate, the contracting officer reviewed the estimate and concluded that it remained reasonable. In reaching this conclusion, he relied on the cost estimator, who reviewed the government estimate to confirm its validity. The cost estimator's review of the government estimate consisted of an analysis of the bases for the estimate, as well as a comparison of the estimate with the bids received; he concluded based on this review that the government estimate was accurate. Because the responsive bids received were 43 percent and 66 percent higher, respectively, than the government estimate, the contracting officer concluded that they were unreasonable.

Dutra/AmClyde argues that the government estimate is unreasonably low and hence does not support the conclusion that its price was unreasonably high. Specifically, Dutra/AmClyde asserts that the government estimate is unreasonable when compared to the results obtained under three price analysis techniques listed in FAR § 15.805-2: comparison of proposed prices, comparison with historical prices, and comparison with the protester's "rough yardstick" calculation.

As to the first technique, comparison of proposed prices, Dutra/AmClyde argues that while the two responsive bids are relatively comparable in price, the government estimate is 43 percent below the lowest responsive bid. Although under certain circumstances competitors' bids may be a better indicator of a fair and reasonable price than the government estimate, Sigma West Corp., B-247916, July 20, 1992, 92-2 CPD ¶ 31, that is not the case here as the bids received were both higher and lower than the estimate. While the bid below the estimate was nonresponsive, the use of a nonresponsive bid as a basis of comparison in a price reasonableness determination can be appropriate, especially where, as here, the nonresponsiveness does not appear to affect the bid price. See id.; MIL-STD Corp., B-212038 et al., Jan. 24, 1984, 84-1 CPD ¶ 112.³ Accordingly, the contracting officer reasonably factored in all the bid prices when performing the comparison with the government estimate.

As to the second technique, comparison with historic prices, as noted above the record shows that the government estimate was based on consideration of the award price for a similar

³Westmont's bid, which was 17 percent below the government estimate, was accompanied by a bid bond that contained three minor defects whose cumulative effect was to render the bond improper and the bid nonresponsive.

prior contract. In its protest, Dutra/Amclyde asserted that that historic price should be increased to account for various factors not present in the prior contract. These factors included an inflation rate of 4 percent per year; longer delivery distances to both the East and West coasts and to Pearl Harbor; the government's purchase of unlimited design rights; and the probability of less favorable subcontracting rates.

In its report, the agency explained how it factored in the type of adjustments the protester cited, and in fact specifically addressed all of the factors mentioned in the protest. The agency reported that the government estimate was adjusted for an inflation rate of 4 percent per year; the government estimate assumed that the cranes would be erected on the same coast as their destination and factored in an additional amount to account for shipping from the West Coast to Pearl Harbor; the government purchased unlimited design rights in the prior procurement as well as in the current one; and less favorable subcontracting rates were not an issue because Westmont intended to do the majority of the work in-house. In its comments on the agency report, the protester did not rebut the agency's specific responses in this area, and we see no basis for questioning the agency's calculation.

The third technique cited by the protester was the use of a "rough yardstick."⁴ Dutra/Amclyde estimated that the selling price of a crane is \$6 to \$7 per pound, excluding the counter weight and unlimited design rights. Applying what it called the conservative yardstick of \$6 per pound to its estimate of the crane's weight, 1.13 million pounds, Dutra/AmClyde argued that the average price of the crane should be \$6,780,000. The protester compared this price with what it asserted was Westmont's average price of \$3,821,000 and with its own average price of \$7,636,437 to argue that its price was reasonable.

The agency in its report disagreed with the protester's basis for the rough yardstick calculation and supplied its own. The agency estimated that the average price of a crane is \$4.16 per pound, including the counter weight and unlimited design rights; the average price was calculated based on price estimates ranging from \$2.81 to \$5.39 per pound. Applying the average price of \$4.16 per pound to the weight of the crane proposed by Westmont, 1.3 million pounds, the agency argued that the price of the crane should

⁴A "rough yardstick" includes such things as dollars per pound or per horsepower, or other units, and is applied to highlight significant inconsistencies that warrant additional pricing inquiry. FAR § 15.805-2(c).

be \$5,408,000; using the lowest and highest price estimates, the price ranges from \$3,653,000 to \$7,007,000. Since Dutra/AmClyde's average price per crane was \$7,636,437, its price was unreasonable under the agency's rough yardstick calculation. As with its contention regarding the agency's calculation of historical prices for the cranes, the protester failed to rebut the agency's responses to its complaint regarding use of the "rough yardstick",⁵ and we see no basis to question the agency's calculation in this regard.

In sum, the record provides no basis to challenge the reliability of the government estimate--the contracting officer's reliance on all the bid prices received for comparison with the estimate was reasonable, and the protester failed to rebut any element of the agency's calculation of the government estimate by reference to historical prices or by use of a "rough yardstick." Under these circumstances, and given that the estimate was based on a thorough consideration of the factors bearing on the expected price for the cranes being procured, we find the contracting officer's decision to rely on the estimate was reasonable. See Adrian Supply Co., B-240871; B-240872, Dec. 21, 1990, 90-2 CPD ¶ 515.

A determination regarding price reasonableness may be based on the government estimate alone, id.; Pipe, Inc., B-236461, Dec. 7, 1989, 89-2 CPD ¶ 526, and we have found a cancellation to be justified where the low responsive bid exceeded the government estimate by as little as 7.2 percent. Building Maint. Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233. Here, since the responsive bids received were 43 percent and 66 percent higher than the government estimate, we find that the contracting officer reasonably concluded that the bid prices were unreasonably high.

Dutra/AmClyde also protests the Navy's determination to enter into negotiations with the three bidders without first determining their responsibility; the protester asserts

⁵In its October 19 comments on the agency report, counsel for the protester argued that he was unable to respond to the agency's assertions because certain documents related to the government estimate were subject to the protective order that had been issued in the protest, and thus could not be provided to the protester for its expert analysis. Counsel asserted that the protester's assistance was necessary to refute the agency's contentions. On October 22, the agency released some of these documents from under the protective order; however, in its November 9 supplemental comments, the protester again declined to specifically refute the agency's contentions.

that this action is contrary to the requirements of FAR § 15.103. That provision states:

"When the agency head has determined . . . that an [IFB] is to be cancelled and that use of negotiation is appropriate to complete the acquisition, the contracting officer may negotiate and make award without issuing a new solicitation subject to the following condition(s)-

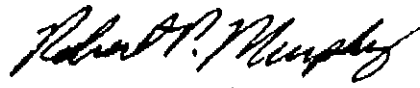
"(a) Prior notice of intention to negotiate and a reasonable opportunity to negotiate have been given by the contracting officer to each ~~responsible~~ bidder that submitted a bid in response to the [IFB]" (Emphasis added.)

Although FAR § 14.207-2(a) provides that a contracting officer shall determine the responsibility of a prospective contractor before making award, Dutra/AmClyde argues that FAR § 15.103(a) provides a different time requirement for the responsibility determination in procurements that are converted from sealed bidding to negotiation. The protester asserts that this provision clearly states that negotiations may only be had with "each responsible bidder"; consequently, an affirmative determination of responsibility for each of the three original bidders is a prerequisite to negotiation with those firms.

A contracting officer should make the determination of responsibility on the basis of information available as closely as practicable to contract award, see Vulcan Eng'g Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403; clearly, a responsibility determination made prior to negotiations, as the protester argues is required by FAR § 15.103, is not made as closely as practicable to contract award. We recognize that, taken literally, FAR § 15.103 refers to negotiations with each "responsible bidder." Nevertheless, given that responsibility determinations should be made as closely as practicable to contract award--thus ensuring that they are as accurate and reliable as possible--we think that the reasonable interpretation of FAR § 15.103 is that it applies only to bidders previously found nonresponsible in connection with consideration of their bids under the

canceled IFB.⁴ See M.C. Dean Elec. Contracting, Inc.,
B-228542, Dec. 21, 1987, 87-2 CPD ¶ 613; Sylvan Serv. Corp.,
supra.

The protest is denied.


for James F. Hinchman
General Counsel

'We note that, even where a bidder has been found nonrespon-
sible under the canceled IFB, it is possible that, under
certain circumstances, that bidder need not be excluded from
the pool of potential offerors under the RFP--if, for
example, the contracting officer were aware that the basis
for the nonresponsibility determination had been remedied.